APPENDIX A — DECISION OF THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION, IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., ET AL.*, DOCKET NO.: A-4441-06T5 DATED MARCH 4, 2009

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4441-06T5

ALLIANCE SHIPPERS, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOTT FROZEN FOODS, INC. AMERICOLD LOGISTICS, L.L.C., ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., MCLANE COMPANY, INC., PIGGLY-WIGGLY CO. AND WINN-DIXIE STORES, INC.,

Defendants,

and

Appendix A

PENOBSCOT MCCRUM, L.L.C.,
COUNTY SUPER SPUDS, INC.,

Defendants-Appellants/
Cross-Respondents.

Argued February 2, 2009 – Decided March 4, 2009

Before Judges Lisa, Reisner and Alvarez.

PER CURIAM.

This appeal involves a commercial dispute between Penobscot McCrum, L.L.C. (McCrum), which bought the assets of Penobscot Frozen Foods, Inc. (Penobscot) at a foreclosure sale, and Alliance Shippers, Inc. (Alliance), the intermodal shipping company that transported Penobscot's and McCrum's products. McCrum appeals from trial court orders dated November 1, 2006, February 16, 2007 and April 3, 2007. Alliance cross-appeals from the November 1, 2006 and April 3, 2007 orders.

In brief summary, McCrum contends that the trial court erred in awarding Alliance approximately $43,000 in damages based on quantum meruit. McCrum also contends the court should not have stricken its offer of judgment. In its cross-appeal, Alliance, invoking claims of successor liability and fraudulent transfer, contends that McCrum was entirely liable for Penobscot's debts to Alliance totaling over $200,000. Alliance argues that the trial court should have applied New Jersey law

rather than Maine law, and that regardless of which state's law applies, it is at least entitled to additional damages for unjust enrichment. We reject the parties' contentions on the appeal and the cross-appeal and affirm.

I

This case involves a Maine-based business, Penobscot, that obtained a business loan in Maine from a Maine bank, Key Corporate Capital, Inc. (Key). After Penobscot defaulted on the loan, Key foreclosed on Penobscot's assets which had been pledged as security for the loan. Although McCrum and Key had had some previous discussions about McCrum purchasing the Penobscot business, Key eventually had the assets sold at public auction. In connection with the foreclosure, Key arranged with Tranzon Auction Properties, an independent professional auctioneering firm with offices in Portland, Maine, to sell the collateral, at auctions held in Belfast, Maine and Washburn, Maine. McCrum produced an affidavit from Key's attorney, who had handled the foreclosure and arranged for the auction sale, attesting that "[t]he foreclosure sale was done at arm's length" and that "Key Corporate's sole objective was to maximize the value of the Key Collateral in order to satisfy Penobscot's obligations" under the defaulted loan.

McCrum also produced legally competent, undisputed evidence that Tranzon was an independent auction firm having no affiliation with Key, McCrum or

Alliance. Although Tranzon widely advertised the auctions and responded to inquiries from fifteen potential buyers, only two bidders participated in the auction at Washburn and one bidder participated in the Belfast auction. McCrum was the successful bidder at both auctions,[1] paying a total of $1.8 million. Under Maine law, a bona fide arms-length purchaser of corporate assets is not liable for the debts of the purchased corporation.

After the foreclosure sale, McCrum essentially continued the potato-processing business, using the same facilities and the same employees as Penobscot. Because McCrum purchased Penobscot's receivables, among other assets, it had the right to collect from Penobscot's customers for products delivered before as well as after the foreclosure sale.

Alliance is a New Jersey-based shipping company which had pre-existing contracts with Penobscot to transport its potato products all over the country. Before the foreclosure action was filed, while the foreclosure was proceeding, and after McCrum bought the assets, Alliance was providing shipping services, transporting the potato products to various locations throughout the United States. McCrum bought Penobscot's assets at auction on April 29, 2004, but did not give Alliance contemporaneous notice of the purchase. Meanwhile, Alliance was transporting potato products produced at

1. A company called Super Spuds had the right to bid, but assigned its right to McCrum, which actually completed the purchase. We will refer to the purchaser as McCrum.

the Penobscot factory now owned by McCrum and for which McCrum would eventually bill Penobscot's customers.

It is undisputed that Penobscot did not require its customers to pay directly for shipping services but rather built those transportation costs into its own bills to the customers. Moreover, as a condition of its contract with Penobscot, Alliance was required to provide Penobscot with invoices for its services and bills of lading signed by the customers. Those documents were due when Alliance's deliveries were complete, and they were then used to create Penobscot's bills to its customers. While each Alliance pick-up of potato products from the factory generally resulted in several "stops" or deliveries to customers throughout the country, Alliance would not get paid for any of its services until it provided one invoice for all the deliveries resulting from that pick-up, plus a bill of lading for each separate delivery.

McCrum continued the practice, billing the customers for products delivered by Alliance and including at least some portion of the charges for Alliance's services in those bills. However, while Alliance produced McCrum's bills at the trial, Alliance did not produce proof as to how much McCrum actually charged its customers for transportation, which was not itemized separately on the bills.

When McCrum refused to pay all of Alliance's outstanding bills to Penobscot for transportation

services, totaling approximately $250,000, Alliance sued McCrum, as well as other parties, to collect the debt.[2] Judge Waugh, then the Presiding Judge of Chancery, General Equity, held that Maine law applied to Alliance's lawsuit.

In an oral opinion placed on the record on August 4, 2006, Judge Waugh reasoned that under the governmental interest test set forth in *Veazey v. Doremus*, 103 *N.J.* 244, 247-48 (1986), and *Fu v. Fu*, 160 *N.J.* 108, 118 (1999), Maine had a greater interest than New Jersey had in applying its law of successor liability to the Maine foreclosure sale. He reasoned that accepting Alliance's position would mean that "arising out of the same [foreclosure] sale transaction you could have many different results depending upon whether you apply the law of one state . . . or another. If you consistently apply the law of the state where [the sale] took place . . . at least it's going to be a uniform application of law ." In a later opinion placed on the record on October 6, 2006, the judge also noted: "The only contact with New Jersey is that Alliance happens to be located in New Jersey. This is not a . . . transaction that . . . took place in New Jersey."

Further, in the October 6 opinion, Judge Waugh noted the parties' apparent agreement that Alliance was entitled to payment for "any transactions that began after the sale of . . . Penobscot's assets at a foreclosure

2. Alliance eventually collected approximately $45,000 in settlements with several other parties.

sale that took place on April 29, 2004 . . . and . . . any shipments that were in transit at the time of the sale on April 29, 2004." In an order dated November 1, 2006, the judge granted summary judgment to Alliance "on the contract claims relating to shipments in transit at the time of the April, 2004 auction sale and for shipments originating after the April 29, 2004 auction sale."

The judge then addressed "the shipments that were complete as of the date of the sale on April 29, 2004."[3] With respect to those shipments, he held that Alliance was entitled to collect from McCrum, under a theory of unjust enrichment, the lesser of the amounts Alliance charged Penobscot for transporting those shipments or the amount McCrum actually billed its customers for the transportation. The basis for the limit on the amount to be recovered was evidence that Penobscot did not necessarily charge its customers the exact amount Alliance charged Penobscot for delivery, but frequently imposed a smaller charge.

In the same opinion, Judge Waugh also granted summary judgment dismissing Alliance's fraud claims,

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3. These "shipments" related to any Alliance deliveries which formed the basis of uncollected Penobscot receivables, which McCrum bought as part of the foreclosure sale. Alliance claimed that all of those receivables included a transportation charge to the customers, and that to the extent that McCrum collected monies attributable to Alliance's transportation services, whenever those services were rendered, without paying Alliance for the services, McCrum would be unjustly enriched.

concluding that there was no proof that the foreclosure sale was anything but a bona fide arm's length transaction:

> [I]t's clear to me that although there were discussions between the bank and the new Penobscot purchasers, that this was a sale that cannot be described as collusive. The . . . sale was duly advertised and an auction took place, or a bidding procedure took place. There was only one active bidder, and that was the parties that I referred to as new Penobscot [McCrum]. There is no suggestion . . . in the record, that anything took place that deterred or discouraged any other potential bidder from appearing at the sale and bidding a higher price.
>
> Under Maine law, that really is the issue for a secured party foreclosure sale for fraudulent transfer. So, I will grant summary judgment to the defendants on that issue . . . .

In response to Alliance's argument that discussions between McCrum and Key bank had resulted in Key setting an undisclosed "reserve" bidding price for the sale, the judge concluded that even if there was such a reserve, it made no difference to the outcome:

> [E]ven if there was a reserve that was not disclosed, I don't see how that infected the sale in any way. . . . [I]f there had been a

> reserve [and] people were told, don't bother showing up unless you're going to bid $1 million, and then at the sale the bank had said, well, nobody has bid $1 million but new Penobscot [McCrum] here has bid [$]900,000 so we're going to waive our reserve and take [$]900,000, that would have been a problem, because clearly . . . other bidders were discouraged to come and bid less than $1 million, but I don't see anything about this transaction that's been put into the record . . . that indicates to me that any . . . bona fide bidders were in any way discouraged or prevented from coming to this auction and . . . making a bid that would have produced more money.

In an oral opinion placed on the record on February 16, 2007, the judge granted a motion striking McCrum's $25,000 offer of judgment, relying on *City of Cape May v. Coldren*, 329 *N.J.Super.* 1 (App.Div.2000). The remaining claims then proceeded to a bench trial before Judge Mathias Rodriguez.

At the bench trial, Louis Trentacoste, Alliance's Vice President of Logistics and Distribution, testified that as a condition of getting paid for its transportation services, Alliance was required to provide Penobscot with bills of lading and proof of deliveries (POD).[4] These

4. This testimony is consistent with a copy of the contract between Penobscot and Alliance, presented to Judge Waugh as part of the summary judgment motions. The contract required Alliance to provide Penobscot with bills of lading.

documents would "show that the product, all of the product was received and in good condition by the people who Penobscot wanted it delivered to." Otherwise "if the bill of lading and COD [sic] is not part of it, then there's always the possibility that Penobscot's purchaser won't want to pay them and say that they didn't receive anything." He also confirmed that without these documents, the shipper, in this case Penobscot, "may not get paid because it needs to have proof that . . . what they sold was delivered to the customer." McCrum did not present evidence to contradict that testimony, although it claimed that for accounting purposes it considered a sale complete when the goods were loaded on Alliance's trucks.

In support of its claim, Alliance produced P-2, a computer-generated report of its accounts receivable billed to Penobscot. The list appeared to indicate that between April 30, 2004 and May 14, 2004, Alliance billed $52,665.90, representing twenty invoices, of which McCrum paid $8699.25. This document did not indicate when the goods were actually picked up and delivered. However, in later testimony, Trentacoste confirmed that Alliance transported approximately twenty shipments on and after April 29, 2004. He also confirmed that those shipments represented the last twenty invoices reflected on the P-2 list of receivables. He testified that Alliance was still owed $43,952.65 for those shipments.

According to Trentacoste, McCrum did not notify Alliance of the auction sale until May 12, 2004. However, in telephone conversations, Alliance was "told that the

business was going to be changing hands and. . . all of our business was going to remain as is." Based on that conversation, Alliance continued to provide its services. According to Trentacoste, frequently those services would include several stops in the course of one shipment, but Alliance was not entitled to submit an invoice or receive payment until all the stops were accomplished.

In his testimony, Gordon Pow, a corporate officer of McCrum, agreed that the carrier "is not entitled to payment until they provide proof of delivery." He also agreed that at least ten of the invoices listed on P-2 referred to "one or more stops [that] occurred on and after 4/29/04." He conceded that after the auction, McCrum never notified Alliance to "stop making . . . deliveries of shipments that it had picked up on or before the auction date."

Following the trial, Judge Rodriguez issued a written opinion dated February 26, 2007, concluding that Alliance was entitled to approximately $43,000 in damages for quantum meruit, including charges for shipments as to which the only remaining service Alliance rendered to McCrum was providing its invoices and bills of lading signed by the customers. He found that without the latter, McCrum could not bill McCrum's (formerly Penobscot's) customers. However, Judge Rodriguez also held that Alliance was not entitled to its claim for approximately $73,000 in additional unjust enrichment damages based on McCrum's pass-through to its customers of transportation charges, because

Alliance failed to prove the amounts McCrum actually charged the customers for transportation costs.[5]

II

This appeal followed, with Alliance claiming it was entitled to approximately $73,000 in additional damages, and McCrum asserting that Alliance was entitled to nothing, apart from approximately $9,000 in service charges for which McCrum already paid. McCrum also claimed that Alliance should pay McCrum's counsel fees under the offer of judgment rule.

Our review of the trial court's summary judgment rulings is de novo, as is our review of the court's decisions on legal issues generally. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App.Div.), *certif. denied*, 154 *N.J.* 608 (1998); *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995); *Mastondrea v. Occidental Hotels Mgmt.*, 391 *N.J.Super.* 261, 283 (App.Div.2007). However, we defer to Judge Rodriguez's factual findings

5. Judge Rodriguez's written opinion reflected an oral opinion which he placed on the record on February 20, 2007, dismissing Alliance's unjust enrichment claim at the close of plaintiff's case. After conferring with Judge Waugh to be sure there was no confusion as to the terms on which Judge Waugh had permitted Alliance's unjust enrichment claim to proceed to trial, Judge Rodriguez concluded that Alliance had the burden of proving the unjust enrichment claim and that its evidence on the pass-through of transportation costs, even viewed in the light most favorable to Alliance, could not sustain that burden.

based on the trial record, so long as they are supported by substantial credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J.* 474, 483-84 (1974).

Because we agree with Judge Rodriguez that Alliance did not prove its claim of unjust enrichment, we need not decide whether Alliance was entitled to assert that cause of action in the first place. Nor do we address McCrum's $25,000 offer of judgment, because our affirmance of Alliance's $43,000 judgment renders that issue moot. Having canvassed the voluminous record, we find no merit in either party's remaining arguments.

We begin with the choice-of-law issue. Our courts apply a governmental interest test in deciding conflict-of-law issues:

> Traditionally, the place of contract governs the choice of law unless another jurisdiction has a more significant relationship with the parties and/or transaction. *State Farm Mutual Auto. Ins. Co. v. Estate of Simmons*, 84 *N.J.* 28, 37 (1980). "This rule is to be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield." *Ibid.* However, our Supreme Court has endorsed a flexible "governmental interest" analysis to determine which state has the greatest interest in governing the specific issue that arises in the

> underlying litigation. *Erny v. Estate of Merola*, 171 *N.J.* 86, 94 (2002); *Lonza, Inc. v. The Hartford Accident and Indem. Co.*, 359 *N.J.Super.* 333, 345 (App.Div.2003). "Ordinarily, choice-of-law determinations are made on an issue-by-issue basis, with each issue receiving separate analysis." *Erny, supra*, 171 *N.J.* at 94. Under the governmental interest analysis, the court is required to determine: (1) whether there is an actual conflict between the laws of the states involved; (2) the policy interest that each state has in applying its law to the particular circumstances and parties; and (3) how strongly the contacts involved relate to each state's policy and whether application of one law will further or frustrate the policies of the other state.
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> [*Walsh v. Mattera*, 379 *N.J.Super.* 548, 555 (App. Div. 2005).]

In applying the governmental interest test, New Jersey follows the *Restatement* in considering the following factors:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied

[*Fu v. Fu*, 160 *N.J.* 108, 122 (1999) (quoting *Restatement (Second) of Conflict of Laws* § 6 (1971).]

There is a conflict between the laws of New Jersey and Maine respecting the issue of successor liability. In New Jersey, the law can be summarized as follows:

> [W]here one company sells or otherwise transfers all of its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct, except where (1) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and

> purchaser; (3) the purchasing corporation is merely a continuance of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape liability for such debts.
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> [*Jackson v. N.J. Mfrs. Ins. Co.*, 166 *N.J.Super.* 448, 454 (App.Div.), *certif. denied*, 81 *N.J.* 330 (1979).]

In Maine, the inquiry is simpler and generally protects the successor corporation from liability for the debts of its predecessor:

> [A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation.
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> [*Dir. of Bureau of Labor Stds. v. Diamond Brands, Inc.*, 588 *A.*2d 734, 736 (Me.1991).]

We agree with Judge Waugh that the analysis must properly focus on the foreclosure sale and not on the contract between Alliance and Penobscot. The foreclosure sale took place in Maine, and that state clearly has a strong interest in governing the legal results of the sale. Maine law appears aimed at creating certainty and thus facilitating the sales of businesses.

Those policies are implicated here. Unless Maine law applies to foreclosure sales in Maine, creditors would have considerable difficulty selling their corporate debtors' assets, because prospective purchasers would have no certainty as to whether they might be charged with the debtor corporations' liabilities. As Judge Waugh observed, unless Maine law applies to the foreclosure sale, a purchaser might be subject to the successor-liability laws of fifty different states, depending on the locations of the foreclosed company's creditors.

Since both Maine and New Jersey have adopted versions of the Uniform Fraudulent Transfer Act, *N.J.S.A.* 25:2-20 to -34 and *Me.Rev.Stat. Ann.* tit. 14, § 3571-3582, application of Maine law does not leave out-of-state creditors without a remedy against fraud. Further, as Judge Waugh correctly noted, other than the fact that Alliance has its principal offices in New Jersey, this State has virtually no contacts with the case. Both Penobscot and McCrum are Maine corporations, the lender was based in Maine, the foreclosure sale was in Maine, and Alliance picked up the goods in Maine and delivered them all over the country. Finally, if any wrong was done in this case, it was committed in Maine, where Alliance alleges McCrum and Key conspired to defraud Penobscot's creditors. We find no basis to apply New Jersey law to this case. *See Fu, supra*, 160 *N.J.* at 122.

Alliance's fraud or "collusive sale" argument is likewise without merit and warrants no discussion, beyond the following comments. *R.* 2:11-3(e)(1)(E).

McCrum and Key had discussions before the foreclosure sale concerning McCrum's possible purchase of Penobscot's assets. However, they were unable to finalize an agreement of sale and therefore Key had the debtor's assets sold at a foreclosure auction. The undisputed evidence is that the sale, conducted by Tranzon, an independent company, was the result of a bona fide auction which was widely advertised. *See Donaghy v. Leighton*, 351 *A.*2d 125, 128 (Me.1976). Even if McCrum and Key had prior discussions, there is no evidence that any other potential purchaser was deterred from bidding or that the price was artificially inflated or depressed. There is no evidence that Key was motivated to do anything other than maximize its recovery of the amounts Penobscot owed. And there is no evidence of collusion, i.e., a "secret agreement . . . to deceive and defraud" Penobscot's creditors or other potential bidders. *Mercier v. John Hancock Mut. Life Ins. Co.*, 44 *A.*2d 372, 376 (Me.1945).[6]

We agree with Judge Rodriguez that Alliance failed to prove its case of unjust enrichment. Alliance claimed that McCrum was unjustly enriched by charging its customers for transportation services for which McCrum had not paid Alliance. In support of that claim, Alliance presented proof of its invoices to Penobscot and McCrum, and proof that McCrum billed its customers

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6. *Cook v. Cook*, 574 *A.*2d 1353, 1354-55 (Me.1990), which Alliance cites, is not on point. That case involved a collusive foreclosure between a divorcing husband and his mother in an effort to keep property away from his wife.

for the products, but Alliance did not present evidence as to the amounts McCrum charged the customers for Alliance's transportation services. Alliance's witness, Kathleen Kertesz, admitted she had no knowledge "as to what freight charges . . . Penobscot [McCrum] would have collected on those invoices." Assuming for the sake of argument that its unjust enrichment theory was viable, Alliance still had the burden to prove its damage claim; it failed to carry its burden. *See Kutzin v. Pirnie*, 124 *N.J.* 500, 516-17 (1991). No further discussion of this issue is warranted. *R.* 2:11-3(e)(1)(E).

Finally, we turn to the issue of quantum meruit. " *Quasi*-contractual obligations are imposed by law to bring about justice, without reference to the parties' intent. *Quantum meruit* is a form of quasi-contract, permitting recovery of as much as is deserved." *Glick v. Barclays De Zoete Wedd, Inc.*, 300 *N .J.Super.* 299, 310 (App.Div.1997) (citation omitted). These obligations " 'rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do.' " *St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co.*, 32 *N.J.* 17, 22 (1960) (quoting 17 *C.J.S. Contracts* § 6, at 324). The test for entitlement is as follows:

> To recover under a theory of *quantum meruit*, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to

> whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Longo v. Shore & Reich, Ltd.*, 25 *F.*3d 94, 98 (2d Cir.1994)
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> *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 172 *N.J.* 60, 68 (2002).]

In this case, Alliance's claim in quantum meruit was based on the facts that it performed services under the Penobscot contract after the foreclosure sale, that McCrum accepted and benefited from those services, and that Alliance performed the services expecting compensation even though it performed some of the services before it learned about the foreclosure sale.

In opposing the claim, McCrum relies on a series of cases that are not on point. In *Callano v. Oakwood Park Homes Corp.*, 91 *N.J.Super.* 105 (App. Div. 1966), we found no basis to invoke quantum meruit where a landscaping company sold shrubs to the contract purchaser of a house. When the purchaser passed away and his estate decided not to buy the house, the landscaper tried to collect the price of the planted shrubs from the homebuilder on a quantum meruit theory. We described quantum meruit as follows:

> *Quasi*-contractual liability has found application in a myriad of situations. However, a common thread runs throughout its application where liability has been

> successfully asserted, namely, that the plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred. It is further noted that *quasi*-contract cases involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit.
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> [*Id.* at 109 (citations omitted).]

We concluded that the landscaper sold and delivered the plants to the contract purchaser, made no mistake as to identity of the person to whom the goods were being delivered, and only had a reasonable expectation of payment from that purchaser.

In this case, by contrast, Alliance provided services to McCrum, not initially realizing that Penobscot's business had been sold at auction. Alliance expected to be paid and in fact ceased providing services as soon as McCrum announced that it would not pay for services rendered under the Penobscot contract. Nor is *Kagen v. K-Tel Entertainment, Inc.*, 172 *A.D.*2d 375 (N.Y. App. Div. 1991) on point; in that case, as in *Callano*, the plaintiff sought to recover for past services to another party, rather than services rendered to the defendant.

Moser v. Milner Hotels, Inc., 6 *N.J.* 278 (1951), is likewise inapplicable here. The parties there had a

written contract setting a price for the plaintiff to paint hotel rooms; the plaintiff tried to charge a higher price and the court held him to the terms of the contract. In this case, while Alliance had a contract with Penobscot, it had no contract with McCrum. However, between the time of the foreclosure sale in April, and several weeks later in May, it was transporting goods belonging to McCrum and otherwise providing services to McCrum. We find no merit in McCrum's argument that it does not owe Alliance for these services in quantum meruit.

Finally, we address the issue of the types of services for which Alliance is entitled to payment. McCrum contends that even under Judge Waugh's ruling, Alliance is only entitled to payment for goods that were *both* picked up and delivered after April 29, 2004. In fact, McCrum contends that it paid Alliance approximately $9000 for those services; Alliance agrees with that figure. However, Alliance contends that it is also entitled to payment for goods picked up before April 29 but delivered after that date, because after April 29 the goods belonged to McCrum and therefore Alliance was actually performing a service to McCrum. Alliance further contends that it is entitled to payment for deliveries made prior to April 29 but for which Alliance had not yet delivered invoices and bills of lading to Penobscot. Alliance claims that delivery of the invoice and bill of lading was the third and necessary part of its work because McCrum could not bill its own customers without proof of transportation and delivery from Alliance. Judge Rodriguez accepted Alliance's argument as to both claims, and awarded Alliance approximately $43,000.

We agree that delivery was an integral part of the service rendered to McCrum, for which Alliance was entitled to payment. McCrum's customers certainly would not have paid McCrum for goods picked up from the factory by Alliance but never delivered to the customers. Under the facts of this case, as found by Judge Rodriguez and as supported by the trial testimony, McCrum also could not bill its customers or collect its charges without the bills of lading, which proved that the correct goods were delivered in undamaged condition. We find no error in the trial court's equitable determination to permit Alliance to recover from McCrum for all of those services which it provided to McCrum after the auction sale.

Affirmed.

APPENDIX B — ORDER DATED NOVEMBER 1, 2006 BY THE HON. ALEXANDER P. WAUGH, JR., JUDGE, N.J. SUPERIOR COURT, LAW DIVISION (MIDDLESEX COUNTY) WHICH, IN PERTINENT PART, GRANTED DEFENDANTS, PENOBSCOT McCRUM, LLC AND COUNTY SUPER SPUDS, INC.'S MOTION DISMISSING PLAINTIFF'S CLAIMS ON SUCCESSOR LIABILITY AND FRAUDULENT TRANSFERS IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., et al.*, DOCKET NO. MID-L-4374-04

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO.: L-4374-04

CIVIL ACTION

ALLIANCE SHIPPERS, INC.,

Plaintiff(s),

vs.

PENOBSCOT FROZEN FOODS, INC.; COUNTY SUPER SPUDS, INC.; PENOBSCOT McCRUM, LLC; FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOT FROZEN FOODS, INC.; PENOBSCOT McCRUM, LLC and CHENEY BROTHERS, INC.;

Defendant(s).

Appendix B

THIS MATTER having been opened to the Court by Scarinci, Hollenbeck, LLC, attorneys for Defendants, Penobscot McCrum, LLC and County Super Spuds, Inc., upon an application for summary judgment, and by Ronald Horowitz, Esq., attorney for Plaintiff, Alliance Shippers, Inc., upon a cross motion for summary judgment, the Court having considered the moving, opposing, reply and supplemental papers, having conducted oral argument on August 4, 2006 and October 6, 2006, and for the reasons stated on the record on August 4, 2006, including issues related to choice of applicable law, October 6, 2006 and further good cause shown;

IT IS ON THIS 1st day of November, 2006:

ORDERED that partial summary judgment be and hereby is granted in favor of the Plaintiff, Alliance Shippers, Inc., and against Defendant, Penobscot McCrum, LLC, on the claim of unjust enrichment relating to invoices of Penobscot Frozen Foods, Inc. to its customers that were paid to Defendant, Penobscot McCrum, LLC for the lessor of Alliance's charge for shipping or the shipping charge built into the price charged to the purchases;

IT IS FURTHER ORDERED that partial summary judgment be and hereby is granted in favor of Plaintiff, Alliance Shippers, Inc., and against Defendant, Penobscot McCrum, LLC, on the contract claims relating to shipments in transit at the time of the April 29, 2004 auction sale and for shipments originating after the April 29, 2004 auction sale;

IT IS FURTHER ORDERED that unless the parties agree to the amount of damages relative to the partial summary judgment granted in the preceding ordering paragraphs, the Court shall conduct a hearing on damages;

IT IS FURTHER ORDERED that partial summary judgment be and hereby is granted to Defendants, Penobscot McCrum, LLC and County Super Spuds, Inc., on the claims of successorship liability and fraudulent transfers;

IT IS FURTHER ORDERED that all claims against Defendant, County Super Spuds, Inc., be and hereby are dismissed with prejudice;

IT IS FURTHER ORDERED that the next case management conference date shall be on December 5, 2006 at 9:00 P.M.;

AND IT IS FURTHER ORDERED that a copy of this Order be served on all counsel of record within seven (7) days of the date hereof.

s/ Alexander P. Waugh, Jr.
ALEXANDER P. WAUGH, JR., J.S.C.

APPENDIX C — TRANSCRIPT OF OCTOBER 6, 2006 DECISION ON MOTION FOR SUMMARY JUDGMENT BY THE HON. ALEXANDER P. WAUGH, JR., JUDGE, N.J. SUPERIOR COURT, LAW DIVISION (MIDDLESEX COUNTY) IN THE MATTER ENTITLED *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC., et al.*, DOCKET NO. MID-L-4374-04

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO.: MID-L-4374-04
A.D. NO.:

ALLIANCE SHIPPERS, INC.

Plaintiff

vs.

PENOBSCOT, ET AL

Defendants

Place: Middlesex County Courthouse
56 Paterson St.
New Brunswick, NJ 08903

Date: October 6, 2006

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[Commencing at page 76]

* * *

THE COURT: Okay. On August 4th on cross-motions for summary judgment, and at that time, I — I — we had a lengthy colloquy as we have had today, and I set forth the nature of the case, and I determined that Maine law applies with respect to the issue of [77] fraudulent transfer, and Mr. Horowitz, sort of at the last minute, asked me to reconsider that.

I have considered his — his argument, but I remain of the opinion that the — the issue is — is governed by the analysis required in *Fu v. Fu* (phonetic) 160 New Jersey 108 (1999), which is the decision of the State Supreme Court where you apply the flexible government interest test and the five factors, and I believe I did that the last time, and I — I'm not persuaded that I was incorrect.

When we discussed in — in colloquy, and I incorporate by reference everything that's — that took place during the argument, because it — it reflects a great deal of my — my thinking on this. The only contact with New Jersey is that Alliance happens to be located in New Jersey. This is not a — a transaction that really took place in New Jersey, and the only contact with Maine is that the — the alleged debtor happens to be in Maine. If that were the case, I would probably decide that New Jersey law should apply to the issue of fraudulent transfer.

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We also — I also asked for some further briefing and discussion of the unjust enrichment/pass-through issue. There were assets that were acquired by the defendants that are generally referred to as new [77] Penobscot, although I believe that they should properly be known as Penobscot McCrum, LLC and County Super Spuds, but I'm going to continue to call them new Penobscot even though defendants may lack — not like that, it's easier for me.

They -- they acquired some assets including receivables, and some of those receivables involved transactions that enrich Alliance was the shipper. Now, Mr. Bals has agreed that any transactions that began after the sale of old Penobscot's assets at a foreclosure sale that took place on April 29, 2004, those shipments would be the responsibility of new Penobscot, and Mr. Bals has also agreed that any shipments that were in transit at the time of the sale on April 29, 2004 would be the responsibility of new Penobscot. So, the only I — the only issues here are the tran — the shipments that were complete as of the date of the sale on April 29, 2004.

Now, with respect to some of those, although perhaps not all, new Penobscot received payment. So the issue was whether they were unjustly enriched by receiving payment that included reimbursement to old Penobscot for the shipping charges. The — the record seems to be clear that — that — could you tell the attorneys outside that I will be with them in probably [79] about 5 or 10 minutes. And they — they just need to cool their jets out there.

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The testimony seems to be clear that old Penobscot charged two prices depending on whether the goods were picked up in Maine or were shipped to the purchaser, and the way it worked was that if something was going to be shipped, there was a matrix that was supplied by old Penobscot, and depending on where it was zoned or where it was going to be shipped to, a charge — what was really a shipping charge was added to the price. Unlike some businesses, it wasn't the product is X and the shipping charge is Y, old Penobscot chose to just take X — the X price, add Y, and come up with Z as the product price.

It also seems to be clear from the record that these calculations were not based on actual shipping charges, they were, I guess, estimates, and it also appears that they were probably not particularly good estimates, and that they were usually lower than the — the actual cost of shipping. So the issue then is whether new Penobscot had — has been unjustly enriched when these invoices are paid and they recover not only the price of the goods, but the added price of the shipping.

I believe that unjust enrichment is an equitable remedy and the argument was made that any unjust enrichment claim was extinguished by the sale on April 29, 2004, but that would not apply in this case because the unjust enrichment didn't take place until after the sale when the payments were received by new Penobscot.

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We spent a lot of time talking in terms of passthrough, and I don't think that when we're dealing with an equitable remedy such as — as this, that a form should be exulted over substance, and I think the substance was that there was the cost of the product and then there was the shipping charge, and old Penobscot chose to not differentiate between them, but to add the shipping charge to the cost and — and that was the price. And I think that by receiving payment for those without requiring some reimbursement of costs to the shipper Alliance, there would be unjust enrichment.

Now, as I think Mr. Horowitz himself recognizes, Alliance is not entitled to receive what — what its charge was for the shipment. It is entitled to receive the difference in price between the cost of the product and the amount charged, which is the cost plus X for shipping. That is the unjust enrichment. So, I will grant partial summary judgment to Alliance on that basis.

[81] Then the remaining issue is the — the allegation that there was a fraudulent transfer. The — it — it's clear to me that although there were discussions between the bank and the new Penobscot purchasers, that this was a sale that cannot be described as collusive. The — the sale was duly advertised and an auction took place, or a bidding procedure took place. There was only one active bidder, and that was the parties that I referred to as new Penobscot. There is no suggestion, as far as I'm concerned, in the record, that anything took place that deterred or discouraged any other

potential bidder from appearing at the sale and bidding a higher price.

Under Maine law, that really is the issue for a secured party foreclosure sale for fraudulent transfer. So, I will grant summary judgment to the defendants on that issue, and I think that takes care of all the liability issues in the case, although you — you need to either sort out the damage issues as — as I have laid out the liability, or we're going to have to have a trial on that issue.

* * * *

APPENDIX D — ORDER DATED DECEMBER 27, 2005 OF THE HON. JOSE L. LINARES IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, et al.*, CIVIL NO. 04-CV-3557 (JLL), REMANDING MATTER TO STATE COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 04-CV-3557 (JLL)

ALLIANCE SHIPPERS, INC.,

Plaintiff,

v.

PENOBSCOT McCRUM, LLC, et al.

Defendants.

LINARES, District Judge.

This matter having come before the Court pursuant to Defendant Frederic D. Starrett's Motion to Dismiss the Second Amended Complaint [35] and the Court having considered all submissions, the case is hereby remanded to the Superior Court of New Jersey, Law Division, Middlesex County as there is no subject matter jurisdiction. For the reasons set forth on the record December 22, 2005,

IT IS on this 27th day of December, 2005,

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ORDERED that Defendant Frederic D. Starrett's Motion to Dismiss [35] is GRANTED; and it is further

ORDERED that the entire case is dismissed for lack of subject matter jurisdiction; and it is further

ORDERED that the case is remanded to the Superior Court of New Jersey, Law Division, Middlesex County; and it is further

ORDERED that the pending motion for summary judgment [52] by Defendants Penobscot McCrum, LLC and County Super Spuds, Inc. is DENIED WITHOUT PREJUDICE as moot; and it is further

ORDERED that the pending motions [56], [59] and [60] are hereby DISMISSED WITHOUT PREJUDICE to be raised in state court; and it is further

ORDERED that the Clerk shall close their file in this matter.

DATED: December 27, 2005

s/ Jose L. Linares
Jose L. Linares
United States District Judge

APPENDIX E — TRANSCRIPT OF DECEMBER 22, 2005 DECISION OF THE HON. JOSE L. LINARES, U.S.D.J. IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, et al.*, CIVIL NO. 04-CV-3557 (JLL), REMANDING MATTER TO STATE COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 04-3557(JLL)

ALLIANCE SHIPPERS, INC.,

Plaintiff,

- vs -

PENOBSCOT FROZEN FOODS, INC., et al.,

Defendants.

December 22, 2005

Newark, New Jersey

TRANSCRIPT OF PROCEEDINGS

[2] THE COURT: This is in the matter of Alliance Shippers, Inc. versus Penobscot Frozen Foods, Inc., et al.

This matter pertains to two motions. One is a motion wherein the defendant Starrett argues that the second amended complaint should be dismissed for lack of subject matter jurisdiction and personal jurisdiction

over defendant Starrett and also alleges improper venue and a failure to state a claim.

The other motion is a motion by defendant Penobscot Mc Crum and County Super Spuds. That is a motion far summary judgment against Alliance Shippers. In that particular motion, Penobscot Mc Crum and Super Spuds claim they are not liable for the amounts owed to Alliance Shippers from Penobscot Frozen Foods, who is now in bankruptcy, based on theories of successor liability.

The procedural history of this case is as follows:

On June 11, 2004, the plaintiff filed the original complaint in the Superior Court of New Jersey Law Division Middlesex County.

Thereafter, on July 26, 2004, defendants Penobscot Mc Crum and County Super Spuds removed the case to federal court invoking federal question jurisdiction under "statutes and federal common law of the United States pertaining to interstate commerce."

On December. 28, 2004, this Court entered default [3] judgment in favor of Alliance Shippers against Penobscot Frozen Foods in the amount of $258,656.73.

Thereafter, on June 10, 2005, the plaintiff filed a second amended complaint with this Court and in that complaint they added the defendant Starrett.

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Three months later on April 13, 2005, defendant Starrett filed this motion to dismiss.

On September 22, 2005, defendants Penobscot Mc Crum and County Super Spuds in turn filed their motions for summary judgment.

The operative facts of this case are as follows:

The plaintiff in this case, Alliance Shippers, is in business which provides freight transport and in this case provided freight transport to Penobscot Frozen Foods, Inc., hereinafter referred to as "Penobscot."

In September of 2004, Penobscot filed for bankruptcy. It is apparently undisputed that at the time Penobscot owed Alliance Shippers outstanding balances for past shipping services, and the amount owed is not an issue in dispute in the present case.

The facts indicate that from the mid 1980s until 2004, the defendant Starrett served as president of Penobscot. The plaintiff has alleged that while acting as president of Penobscot, Starrett intentionally misrepresented Penobscot's financial position so that [4] plaintiff would continue to provide shipping services to them.

After Penobscot filed for bankruptcy and defaulted on its loan obligation, its lender, Key Corp., foreclosed on many of Penobscot's assets and sold said assets at an auction. Defendant County Super Spuds negotiated

with Key Corp. to bid on some of the assets in an open auction. Before the auction, Spuds assigned its rights to Penobscot Mc Crum, hereinafter referred to by this Court as "Mc Crum." Mc Crum was the highest bidder at two separate auctions for the assets being sold by Key Corp.

The complaint that was originally filed by the plaintiff and which was in existence at the time of the removal by the defendants, Mc Crum and Spuds alleged essentially the same counts against all of the defendants that had been named at that time. That is, that the plaintiff rendered freight transportation services on behalf of the defendants, that there was a balance due from said defendants, and that the defendants agreed to pay the amounts due. The complaint does not state any additional facts with respect to the citizenship of the defendants or the nature of the services performed by plaintiff or the basis for the amounts owed for those services.

Defendants, Mc Crum and Spuds, in their notice for removal, stated that the basis for federal jurisdiction in [5] this case was that "this case contains claims and actions which arise under the laws of the United States, specifically the statutes and federal common law of the United States pertaining to interstate commerce." These defendants in the notice for removal do not provide any additional facts other than those that were provided by the plaintiff in the original complaint. It is against this background of facts that the Court now moves to a disposition of this motion.

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First, with regard to subject matter jurisdiction, Federal Rule of Civil Procedure 12(h)(3) expressly states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the Court shall dismiss the action." Thus, the Court has the power to inquire at any time, into the jurisdiction for all of the defendants, whether raised by the defendants or by the court. *See*, *Clark v. Paul Gray*, 306 U.S. 583 (1938); *see also*, *Trent Realty Assocs. v. First Fed. Sav. and Loan Ass'n. of Philadelphia*, 657 F.2d 29, 36 (3d Cir. 1981). In this case, the plaintiff did not seek the remand of this case to the state court after the case was removed by the defendants. The issue of lack of subject matter jurisdiction was first raised in the present motion of defendant Starrett, a defendant which was added subsequent to the time that the matter was removed to this [6] court.

In order to remove a case from state court to federal court, a plaintiff must have been able to file the case originally in federal court either because of diversity of citizenship or because there is a federal question jurisdiction. This has been chiefly held in the case of *Caterpillar, Inc. v. Williams*, 482 U.S. 286, 392 (1987). In the notice for removal, if the defendant seeks to remove the case to federal court, the defendant is required to submit "a short and plain statement of the grounds for the removal." *See*, 28 U.S.C. 1446(a). Additionally, "the defendant's right to remove is to be determined according to the plaintiff's pleading at the time of the petition of removal," and any doubts about

jurisdiction should be resolved in favor of remand." *See, Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985).

For a case to have been originally brought in federal court based on federal question jurisdiction under section 1331, it is required that either a "federal law creates a cause of action," or that "the complaint poses a substantial federal question." *See, Virgin Islands Housing Authority v. Coastal General Construction Service Corp.*, 27 F.3d 911, 916 (3d Cir. 1994). There must be more than "the mere presence of a federal issue in the state cause of action," id. (quoting *Merrell Dow Pharmaceutical, Inc. v.* [7] *Thompson*, 478 U.S. 804, 813 (1986); for federal question jurisdiction to exist, there must be "a serious federal interest . . . thought to be inherent in a federal forum." *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 125 S.Ct. 2363, 2367 (2005).

In looking at plaintiff's pleadings at the time this case was removed, this Court notes the following:

(1) Plaintiff does not allege a violation of any federal law or even reference any federal law in his complaint. (2) Plaintiffs' allegations appear to be purely state law collection actions. (3) Plaintiff does not mention interstate commerce and merely states that the amounts owed were for freight transportation, and (4) plaintiff does not mention shipping originations or destinations, rates charged, how rates were computed or any other details about the "freight services" for which the money

was owed. Additionally,. defendant Mc Crum and Spuds in their notice for removal did not provide any additional facts indicating to this Court the basis for federal jurisdiction. All that they did was just generally make a reference to "interstate commerce."

The Court has also reviewed the plaintiff's second amended complaint, which was filed after the removal of this case. In that case the plaintiff added defendant Starrett based on a claim of misrepresentation. Plaintiff does not [8] state any basis for federal jurisdiction in that complaint or add any additional facts related to the services it provided for the defendants. Additionally, in its opposition brief to the defendant Starrett's motion to dismiss, the plaintiff appears to be guessing that the specific basis for defendants Mc Crum and Spuds' claim of federal jurisdiction was that the case involved the Interstate Termination Act, 49 U.S.C. section 10701, et seq. Aside from now agreeing that federal law governs collection of the amounts owed, plaintiff provides no additional facts about the services rendered or the basis for the amount owed. The actual amount owed is undisputed.

Plaintiff does point, however, to three cases in order to support its statement in its opposition to the defendant's motion that there is no federal jurisdiction. The plaintiff points to *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F2d 1227 (7th Cir. 1982), North 1287 (7th Circuit 1982) *North Penn Transfer v. Victaulic*, 859 F. Supp. 154 (E.D. Pa. 1994), and *Oneida Motor Freight, Inc. v. Ormond Shops, Inc.*, 126 B.R. 431 (D.N.J. 1991).

The Court has carefully looked at this case. However, none of these cases in the Court's view stand for the proposition that a mere collection action which happens to arise out of "freight charges" is enough to establish a federal question jurisdiction. *Western Transp.* concerns the tariff amount [9] that a carrier is required to receive under 49 U.S.C. section 10761 and the ability to sue for undercharges, 682 F.2d at 1229. The Court notes that section 10761 is no longer in force as it was omitted in the 1995 amendment to the Interstate Commerce Act. Furthermore, that case does not deal with just collection, but rather deals with the appropriate determination of the amount due. As far as the *North Penn* and *Oneida* cases cited by the plaintiff, those cases also deal with the subsequent action to recover undercharges based on tariff rates filed for interstate commerce transportation, not a mere collection of undisputed amounts as is the case here.

In 1983, however, the Supreme Court in the *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.* held that an action for mere collection of filed rate tariffs does create federal jurisdiction. That case, however, was decided before the deregulation of the industry which occurred in 1995, and that deregulation resulted in the ICC Termination Act of 1995. *See, Matthew Bender*, 4-20 Goods in Transit section 20.03. Therefore, presently, tariffs are no longer required to be filed for rail, air and many motor carriers. *Id.* The *Thurston* decision therefore is based on the theory that because the carrier's right to collect unpaid charges depended on filed rates and the Interstate Commerce Act

requirements at the time, it held that the collection of [10] filed rate tariffs created a federal question jurisdiction. That is not the case now, and therefore that decision is distinguishable and not applicable to a case like the one presently before this Court where filed tariffs are not in any way involved. *See, Central Transp. Int'l. v. Sterling Seating, Inc.*, 356 F. Supp. 2d 786, 790 (E.D. Mich. 2005).

Having reviewed the complaints that have been filed in this matter, as well as the submissions of counsel, there is no question in this Court's mind that in the case presently before the Court there are no facts on this record that indicate that the amount incurred by the plaintiff for the freight services and which they now seek to recover from the remaining defendants based on various state law theories were "filed rate tariffs." Furthermore, no other authority has been provided by counsel to this Court asserting that under the current ICC Termination Act provisions that a mere action, such as the one before this Court, based on filed rates creates federal question jurisdiction.

Furthermore, at the time that this matter was removed to this Court, the pleadings clearly did not state a claim that was either created by federal law or that involved a substantial federal question. Furthermore, even looking beyond those pleadings, the Court finds that no federal jurisdiction exists in this case. When one looks at the details of this case, it is readily apparent that all [11] the plaintiff is asserting herein is merely a state law collection claim, as well as other purely state law claims.

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As it pertains to the issue of diversity jurisdiction, diversity jurisdiction under section 1332 is available only if the citizenship of all plaintiffs is diverse from the citizenship of all defendants. *See, Strawbridge v. Curtiss*, 7 U.S. (Cranch) 267 (1806). Furthermore, a corporation is deemed to be a citizen where it is incorporated and where it has its principal place of business. 28 U.S.C. section 1332(c). Looking at the citizenship of the defendant parties in this case, it is apparent that the defendants Mc Crum and Spuds did not assert diversity jurisdiction as the basis for removal and the pleadings do not establish that complete diversity in fact existed at the time of removal. As a matter of fact, additional filings at this time do not provide any information upon which this Court could determine that complete diversity exists, nor such diversity has been asserted or established by the facts. Therefore, this Court does not have diversity jurisdiction over this case.

The Court having found that no substantial federal question exists in this case and that this case involves matters which are purely state claims, and that no diversity jurisdiction exists dismisses this action and remands this action, and it does not need to reach the merits of the [12] other claims since this Court does not have jurisdiction to adjudicate this matter.

Therefore, for all of these reasons, an order will be entered on today's date ordering that the case will be remanded to the Superior Court of New Jersey Law Division for Middlesex County.

* * * *

APPENDIX F — ORDER OF THE NEW JERSEY SUPREME COURT IN *ALLIANCE SHIPPERS, INC. v. PENOBSCOT FROZEN FOODS, INC. et al.*, C-36 SEPTEMBER TERM 2009 63,982, DENYING ALLIANCE'S PETITION FOR CERTIFICATION DATED SEPTEMBER 11, 2009

SUPREME COURT OF NEW JERSEY
C-36 September Term 2009
63,982

ALLIANCE SHIPPERS, INC.,

Plaintiff-Petitioner,

v.

PENOBSCOT FROZEN FOODS, INC., et al.,

Defendants,

and

PENOBSCOT MCCRUM, L.L.C.,
COUNTY SUPER SPUDS, INC.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4441-06 having been submitted to this Court, and the Court having considered the same;

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It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 9th day of September, 2009.

s/ [illegible]
CLERK OF THE SUPREME COURT